IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1686

LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 75-1729

LODGES 1746 AND 743, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

UNITED AIRCRAFT CORPORATION, *Respondent.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF UNITED AIRCRAFT CORPORATION IN OPPOSITION TO CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OPINIONS BELOW

These are companion § 301 and NLRB cases. All the opinions are reprinted in the separate appendix to the petitions, cited here and in the petitions as "—a." The consolidated opinion of the Court of Appeals for

the Second Circuit in both cases (— F.2d —, 90 LRRM 2272) is in the separate appendix at 2a-82a. (Petitions for rehearing and suggestions for rehearing *en banc* were denied in both cases by the Court of Appeals, 206a-207a, 483a-484a). In the § 301 case, the opinion (299 F. Supp. 877) and judgment of the District Court (Clarie, J.) are at 83a-205a. In the NLRB case, the opinion of the Board (192 NLRB 382) is at 209a-238a. The opinion of the Trial Examiner is at 248a-482a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED

I. Where, in the Union's § 301 suit attacking the Company's administration of the 1960 Strike Settlement Agreements, the Court of Appeals upheld all the District Court's crucial findings of fact that the Company properly and in good faith carried out the Agreements, is the § 301 case appropriate for review by this Court?

II. Where the Court of Appeals, in the exercise of its discretionary authority, and in accord with well-defined standards, declined to apply retroactively to 1960 strike settlement events a 1967/68 change in well-established law, is the NLRB case appropriate for review by this Court?

STATUTE AND RULE INVOLVED

The statute involved in both cases (Labor Management Relations Act of 1947) is adequately set forth in the petition in No. 75-1729. However, the petitions do not set forth, or mention, Rule 52(a), Fed. R. Civ.

Proc., which is also involved, and which states, in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

COUNTERSTATEMENT OF THE CASE

Both these companion § 301 and NLRB cases center around Strike Settlement Agreements negotiated and executed in 1960 by the petitioning Unions and the respondent Company to settle a strike which occurred in that year. The District Court, the NLRB, and the Court of Appeals found and held that in all major respects the Company reinstated strikers in accordance with the Agreements and the National Labor Relations Act.

The complex facts about the Agreements and their administration, developed at extremely lengthy hearings in both cases, are set out and analyzed in detail in the lengthy opinions of the two courts, the NLRB, and the NLRB Trial Examiner.[1]

Petitioners Lodges 743 and 1746, IAM, (the Union) were and are the collective bargaining representatives of certain of the Company's plants in Connecticut. Lodge 743 represents employees at the Windsor Locks and Broad Brook plants of the Hamilton Standard

[1] The hearing in the District Court took 52 days between February 21 and July 7, 1967. See 5a. The transcript consists of more than 10,000 pages. The hearing before the Trial Examiner took place at "numerous intermittent sessions [256 days] beginning on May 16, 1963, and closing on June 11, 1968." 251a. The transcript consists of more than 30,000 pages. The joint appendix in the § 301 case in the Court of Appeals (§ 301 J.A.) consists of 6 volumes and 2,639 pages. The joint appendix in the NLRB case in the Court of Appeals consists of 5 volumes and 1,974 pages.

Division of the Company. Lodge 1746 represents employees at the East Hartford and Manchester plants of the Pratt & Whitney Aircraft Division of the Company. 87a. The Union struck these plants for a new contract in early June, 1960. The strike lasted nine weeks. It was accompanied by violence. 3a-4a, 88a, 225a.

The Company commenced in mid-July to hire permanent replacements for strikers, and this program continued until the strike ended. 14a-15a, 47a-48a, 90a-91a, 107a-117a.

After intensive negotiations between the parties, the strike was settled August 11, 1960, by three "interrelated" (100a) agreements signed by the parties. These were: (1) a new collective bargaining contract, (2) two written Strike Settlement Agreements (one for Pratt & Whitney, the other for Hamilton Standard) on standards and procedures to govern the recall of strikers to jobs at the four plants, and (3) written agreements to arbitrate the cases of 50 strikers accused of serious strike misconduct. 4a-9a, 90a-101a.

The full text of the Strike Settlement Agreements is in the margin at 8a-9a. The Court of Appeals described the Agreements as follows:

> The Strike Settlement Agreements called for strikers desiring to return to work to express their intention by registering. Under the terms of the Agreements registration would take place at Hamilton Standard on August 9 and 10, 1960. Strikers not registering would be treated as having quit and not desiring to return to work. Those strikers who did register would then be recalled in accordance with the provisions in the Agreements. . . . The Agreements provided for recall to occur in three phases, corresponding to paragraphs 4(a), 4(b) and 4(c). Under Phase 1, strikers would be returned to their prestrike jobs (i.e. same job code, department and shift) if they were available at the end of the strike. If a striker's prestrike job was not available, under Phase 2 he would then be recalled to certain other jobs then available. Finally, under Phase 3 registered strikers not recalled up to that point would be put on a preferred hiring list and placed in jobs which developed before December 31, 1960, the expiration date of the Agreements, before new employees were hired. The order of recall under phases 2 and 3 was to be governed by the relative seniority of the strikers as provided in the collective bargaining agreements recently ratified by the Union membership as part of the strike settlement. 7a-9a.

6,536 strikers registered for reinstatement pursuant to the Agreements. The great majority of these strikers were reinstated by the time the Strike Settlement Agreements and the preferred hiring lists established by them expired on December 31. Only 1,562 registered strikers, out of the 6,536 strikers who originally registered, failed to receive offers of reinstatement under the Agreements before they expired. 9a-10a, 126a-130a. (723 of the 1,562 were at Pratt & Whitney, and 839 at Hamilton Standard.) Strikers who were not recalled during the 4½ month term of the Agreements were not recalled principally because of production imbalances caused by the strike, and reduced employee complements attendant thereto, and/or because they were not eligible for recall under the terms of the Agreements. In this connection, the Court of Appeals noted (11a-12a):

> "It is important to recognize that the aggregate figures set out above [9a-10a] provide a broad and

somewhat oversimplified picture of the recall process. The plants involved were not simple units in which all jobs were completely interchangeable. For administrative purposes, plants were divided into separate seniority groups known as 'seniority areas,' and an employee's seniority (length of continuous service with the company) operated only within his seniority area. At Pratt & Whitney types of job skills were classified into 'occupational groups.' Hamilton Standard collective bargaining contracts did not utilize the term 'occupational group' but substituted the concept of 'demonstrated ability' (previous experience in a job that had shown his ability in it). The recall Agreements incorporated this organizational structure, and limited [footnote, 11a-12a, omitted] the recall rights of strikers to available jobs and jobs which developed 'in their occupational groups and seniority areas' (at Pratt & Whitney) and to jobs in which they had 'demonstrated ability' (at Hamilton Standard). Thus, the mere existence of a job vacancy at one of the plants did not automatically mean that a striker had a right to fill the job. If, for example, the vacancy occurred in a seniority area and occupational group for which no strikers were awaiting recall, the Company was entitled under the terms of the Agreements to hire new employees, and in fact this did occur."

Of the 723 employees not reinstated at Pratt & Whitney, 605 responded to letters inviting them to apply for re-employment, and 277 of them were hired as new employees in the first four months of 1961. In addition, 1,562 other employees out of more than 17,000 non-striker applicants were hired at Pratt & Whitney during this time. At Hamilton Standard, 585 of the 839 applied for re-employment, of whom 177 were hired in the first four months of 1961. During this

same period, Hamilton hired only 382 additional new employees from among several thousand applicants. 7a-11a, 124a-130a.[2]

The Union, dissatisfied with the Company's reinstatement actions, attacked them from two directions—in a § 301 suit in U. S. District Court and in an NLRB proceeding.

In the § 301 case, by way of introduction to its rulings, the District Court said (112a):

> The plaintiff-unions have launched a scattergun type of attack on the defendant's claimed violations of the Strike Settlement Agreements; they

[2] As the District Court and the Court of Appeals noted, and the statistics show, much higher percentages of striker applicants than of non-striker applicants were hired during this period. 57a-58a; 128a-130a. Moreover, the record shows, and the courts below noted, the business reasons which led to the 1961 hirings. 22a-25a, 130a-149a.

The great majority of the 1961 Hamilton hires were in the fuel control section of the Windsor Locks plant where all but 149 of the registered strikers had returned to work in 1960. In this section during the first four months of 1961, 89 strikers and 232 non-strikers were hired. § 301 J.A. 2549-2551. Furthermore, large numbers of the new employees were hired in departments where the Company had been hiring new employees even during the time the preferred hiring list was in existence. Thus Pratt & Whitney hired 170 new employees from August 10 through December 31, 1960, at its East Hartford plant in Departments 35, 36, 37, 42, 50, 82, 96, 97, 122, 254, 315, 325, 343, 344, 415, 419, 421, 516, 517, 518, 603, 616, 812, 824, 952, 954, 955, 963, 978, 1222, and 1225. In those same departments during the first four months of 1961, Pratt & Whitney hired a total of 755 persons other than strikers. § 301 J.A. 2463-2500. Further, of the remaining 838 non-strikers hired in the first four months of 1961, many were hired in departments where all strikers had returned to work or resigned in 1960. Thus, all strikers had returned or resigned in 1960 in Departments 252, 253, 317, 322, 346, 424, 436, 615, 619, 622, 661, 979, and 1226, and Pratt & Whitney hired 199 non-strikers in these departments during the first four months of 1961. § 301 J.A. 2473-2480, 2483-2486, 2493-2494, 2499-2500.

> claim that practically everything the defendant did in administering the Settlement Agreements was unlawful and carried out with evil motives. Where the settlement contracts afford the plaintiffs' membership greater rights than the national labor law, they tenaciously stress the terms of the settlement contract; but where the inverse position would seem to be more advantageous, they minimize the applicability of the contract terms and seek to apply principles and policies embodied in established precedents under the body of federal labor law.

After trial, the District Court "issued a lengthy decision . . . largely in favor of the defendant, although it did find that the Company breached the agreements in some limited respects." 5a. The Court of Appeals meticulously reviewed the record and, with minor exceptions, affirmed the District Court. In the course of its opinion, the Court of Appeals commented (13a):

> "In this case, perusal of the voluminous record coupled with a glance at the lengthy opinion of the district court reveals the diligence of the district judge and the detailed nature of his findings."

The two courts rejected the Union's assertion that the Company deliberately and in bad faith depressed the complements of needed workers during the 4½ months that strikers remained on the preferred hiring list, and that it did so to avoid recalling strikers. They found that staffing did not return to pre-strike levels principally because of production imbalances caused by the strike. 10a-11a, 13a-14a, 17a-25a, 32a-33a, 119a-149a.

The two courts rejected the Union's contentions that there was an explicit or implicit agreement or commitment by the Company to restore employee complements to their pre-strike levels by the termination date of the Strike Settlement Agreements, or that the Company misled the Union about the Agreements or their potential effect on reinstatement opportunities of strikers. 14a-20a, 90a-92a, 115a-117a, 119a-149a, 130a-131a, 140a-141a, 171a-176a.

The two courts found that the Agreements were carried out by the Company in good faith. 13a-25a, 141a, 148a, 176a-189a.

The two courts found that the hiring of new employees and of strikers as new employees, that occurred after the expiration of the Agreements and the preferred hiring list on December 31, neither violated the Agreements—indeed, the District Court noted that the Union made no claim that the strikers had rights under the Agreements after December 31, 123a-124a—nor demonstrated any purpose on the Company's part to keep the employee complements depressed until after December 31. 21a-25a, 123a-149a.

The District Court also found that in recalling and placing strikers during the term of the Strike Settlement Agreements, the Company did not breach the Agreements, save in minor respects. The Court of Appeals revised these rulings with respect to a few of the strikers. 6a-7a, 11a, 25a-40a, 92a-100a, 107a-119a, 149a-171a.

In the NLRB proceeding the Board, upheld by the Court of Appeals, found, on the basis of the records in both the NLRB proceeding and the § 301 suit:[3]

> that the Strike Settlement Agreements were carried out by the Company in good faith, 48a-49a, 57a, 60a, 217a, 222a;

[3] The Board said: "We concur in the Trial Examiner's characterization of Judge Clarie's opinion as being 'a masterly analysis of all the facts and circumstances of the situation.'" 217a.

that the Company did not deliberately or in bad faith depress the employee complements during the term of the Agreements, and did not violate the Act by not restoring full complements by the termination date of the Agreements, 61a, 216a-219a; and

that the hiring of new employees and of strikers as new employees, after the Strike Settlement Agreements and the preferred hiring lists expired on December 31, was proper under the Act, as it was under the Agreements, 47a-58a, 210a, 219a-229a, 405a.

The Board also found, in tandem with the District Court's ruling in the § 301 suit, that the Company did not violate the Act in recalling and placing strikers during the term of the Agreements, with the exception that there was a violation with respect to those few strikers whose treatment the District Court had ruled violated the Agreements. 219a, 405a-407a. The Court of Appeals remanded these rulings to the Board for further consideration. 58a-66a.

REASONS FOR DENYING THE WRITS

Introduction

These two "inextricably intertwined" (7a) § 301 and NLRB cases followed a strike which occurred in 1960 and which was settled in that year by three "interrelated" (100a) written, signed agreements, including Strike Settlement Agreements providing standards and procedures for reinstatement of strikers, negotiated by competent representatives of both sides, advised by competent attorneys. The Union's assertions, strenuously advanced below and now in this Court, that the Company misinterpreted and misapplied the Strike Settlement Agreements, and that it administered them with "evil motives" (112a), to deny reinstatement to some of the strikers (the great majority of whom were reinstated pursuant to the Agreements), have been rejected by the District Court, the NLRB and the Court of Appeals in unassailable findings of fact based upon and supported by the voluminous and complex records in the two cases. There is no basis for this Court to undertake to examine the records of the cases and the findings derived therefrom by the two courts and the NLRB.

Similarly, there is no basis for review by this Court of the judgment of the Court of Appeals, well supported by the records in the two cases, that the hiring actions taken by the Company in 1961, after the expiration of the Agreements and in keeping with the Agreements, were in accord with Board law as it then stood and ought not to be overridden retroactively by Board law as it developed years later. The Court of Appeals, in whose discretion the issue of retroactive application of agency actions lies, applied well-established standards, based on a landmark decision of this Court, in resolving this question of law.

In short, the actions at issue present no novel question affecting Federal law, nor does the decision of the Court of Appeals misapprehend or misapply the standards for review of trial court and administrative agency decisions. Accordingly, the petition for writs of certiorari should be denied.

I. There Is No Basis for Review by This Court of the Correct Decision of the Court Below in the § 301 Suit.

A. The District Court received and heard and reviewed the evidence in a long trial and found as fact, in a long and careful opinion (pp. 8-9, *supra*):

> that there was no commitment inside or outside the Strike Settlement Agreements to restore employee complements to their pre-strike levels by the termination date of the Agreements and the preferred hiring lists, or to reinstate all strikers by then, or to reinstate them without regard to business needs and conditions;
>
> that the Company carried out the Agreements in good faith and did not deliberately and in bad faith depress employee complements to avoid reinstating strikers, but rather the complements were not restored because of production imbalances caused by the strike; and
>
> that the hiring of strikers and new employees that occurred after the expiration of the Agreements (pp. 6-7, *supra*), was in accord with the Agreements and did not demonstrate any purpose on the Company's part to keep the employee complement depressed until the Agreements expired.

The Court of Appeals reviewed and upheld these findings of fact in its own long and careful opinion (pp. 8-9, *supra*).

The essence of the petition is that the Court should undertake to review the voluminous record in the case and reverse these findings of fact, which petitioners attack by means of selective citation to the record and the opinions below. The petition is a trial brief. It makes again to this Court the arguments about the facts which were made to, and which were rejected by, the courts below. Virtually every argument in the

petition rests on a view of the facts not accepted by the courts below. The Court of Appeals having applied the test of Rule (52a), Fed. R. Civ. Proc., to the District Court's findings of fact (12a), and found them not wanting,[4] there is clearly no basis for this Court to review those findings. Not only were the findings not "clearly erroneous" they were, as the opinions below demonstrate, clearly correct.

The Union's § 301 petition comes down to this—that however many strikers were in fact reinstated pursuant to the 1960 Agreements, no striker should have been left unreinstated and, therefore, to the extent the Agreements did not result in reinstatement, they should be read today as a dead letter, or the facts should now be found to make them a dead letter. The contention is baseless. As the District Court noted:

> "Where the settlement contract affords the plaintiffs' membership greater rights than the national labor law, they tenaciously stress the terms of the settlement contract; but where the inverse position would seem to be more advantageous, they minimize the applicability of the contract terms and seek to apply principles and policies embodied in established precedents under the federal labor law." (112a).[5]

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[4] For example: "The Union's theory depends upon acceptance of the idea that the Company developed an elaborate charade to obtain an ample—but not too ample—level of production. It also ignores the fact that there may have been difficulties regaining normalcy in a section after a bitter and protracted strike, as the Operating Committee minutes reveal were present at the East Hartford Machine Shop. [fn., § 301 J.A. 2350.] That the district court rejected this scenario was within its proper role as trier of fact." 25a.

[5] The Union even acknowledges (§ 301 Pet. 30) that the Agreements granted greater reinstatement rights than the Act.

Competent representatives of both parties, advised by competent attorneys on both sides, negotiated the Agreements. The Agreements are enforceable under § 301. *Retail Clerks* v. *Lion Dry Goods,* 369 U.S. 17 (1962). The Agreements contained a time limit. Had the parties, *negotiating in the factual and legal circumstances then existing,* (including, *inter alia,* the Company's hiring of permanent replacements for strikers during the month preceding the end of the strike), understood that reinstatement was promised or certain or legally required for all strikers, then the Agreements would have so reflected and would not have contained any time limit at all. Instead, the parties negotiated Agreements that extended the preferred hiring lists for 4½ months. This allowed for the possibility of, and achieved, reinstatement for strikers replaced during the strike by permanent hires and for strikers whose jobs were otherwise unavailable when the strike ended. And the final result was the reinstatement of the great majority of the strikers. Moreover, as the courts below found (21a-25a, 123a-149a), the hiring that occurred in 1961 after the expiration of the Agreements, which was necessitated by business conditions and much of which occurred in areas where most or all strikers had already been reinstated (pp. 6-7, n.2, *supra*), was also in keeping with the Agreements [6] and reflected no purpose to frustrate the Agreements.

Accordingly, for all the reasons stated, there is no basis for review by this Court of the rulings of the

[6] In the District Court the Union did not challenge the post-December 31 hirings as violations of the Agreements (123a-124a), although in this Court (§ 301 Pet. 27-28) it appears to argue, despite the findings of the courts below, that the Agreements should be "reformed" to extend the termination date.

courts below that the Agreements did not require reinstatement of all strikers.

B. Arguments III and IV of the § 301 petition challenge the extensive and detailed decisions of the courts below reviewing the Company's actions during the term of, and pursuant to, the Strike Settlement Agreements, in reinstating and placing strikers, including the resolution of competing claims for placement between strikers and non-strikers, and also among strikers. 6a-7a, 11a-12a, 25a-40a, 92a-100a, 107a-119a, 149a-171a. This is another instance of the Union, having made the Agreements and gained reinstatement of thousands of strikers pursuant to them seeking [as the District Court noted (112a)] to have it both ways. In fact, the decisions reached by the District Court, as modified in some respects by the Court of Appeals, achieved perfectly appropriate and fair readings of the Agreements, and resolutions of the myriad questions of placement which inevitably arose in administration of the Agreements involving thousands of strikers in a highly complex industrial setting. The Union's various contentions that all the strikers' claims for placement should be granted, whatever the circumstances of the non-striker with a competing claim, or whatever and wherever the job from whence the striker came as compared to the job which the Union claimed for him, were correctly evaluated by the courts below. Such claims of the Union on placement issues as were rejected by the courts below are supported neither by the Agreements nor by case law.

The Court of Appeals also remanded some of these placement questions to the Board for further consideration, in light both of the Agreements and the Statute. 58a-66a. The Union says (§ 301 Pet. 44) that

"even if certiorari were to be denied on all other issues," this Court should consider the Union's claims that relate to the remanded issues. Clearly, however, there is no basis for this Court to be involved. The remand should go forward and the Board should consider and decide the issues, as instructed by the Court of Appeals.

II. There Is No Basis for Review by This Court of the Court of Appeals' Correct Decision Not To Apply Retroactively the 1967 and 1968 Fleetwood and Laidlaw Cases to the Events of the 1960 Strike Settlement Which Were at Issue in This Case.

A. The court below adhered to well-settled principles in refusing to apply retroactively *NLRB* v. *Fleetwood Trailer Co., Inc.,* 389 U.S. 375 (1967) and *The Laidlaw Corporation,* 171 NLRB 136 (1968), *enforced,* 414 F.2d 99 (7th Cir. 1969), *cert. denied,* 397 U.S. 920 (1970), to the instant case. Placing primary reliance on the test formulated by this Court in *Securities & Exchange Commission* v. *Chenery Corporation,* 332 U.S. 194 (1947) [hereinafter, "Chenery II"], as discussed in *Retail, Wholesale and Department Store Union, AFL-CIO* v. *NLRB,* 466 F.2d 380 (D.C. Cir. 1972) [hereinafter "RWDSU"], the Court of Appeals found that under the circumstances of the instant case, it would be "unwarranted" and "unjust" to apply these precedent-changing cases to facts which occurred in 1960—fifteen years prior to the decision at issue. 55a-57a.

This Court projected a "rather pointed hint"[7] in *Chenery II* that retroactivity in administrative decision-making is not favored. The Court declared:

[7] *NLRB* v. *Majestic Weaving Co., Inc.,* 355 F.2d 854, 860 (2d Cir. 1966).

> "Since [an agency] unlike a court, does have the ability to make new law prospectively through the exercise of its rule-making powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct. . . ." 332 U.S. at 202.

The following standard of close scrutiny of retroactivity was thus formulated by the *Chenery II* Court:

> "[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law." 332 U.S. at 203.

The outcome of the Chenery II balancing test "is in each case a question of law, resolvable by the reviewing courts . . . ." *RWDSU,* 466 F.2d 380, 390, citing *NLRB* v. *Guy F. Atkinson Co.,* 195 F.2d 141 (9th Cir. 1952).

Since *Chenery II,* courts have repeatedly voiced their disapproval of retroactive application by the NLRB of new standards of conduct to replace prior settled standards formulated through administrative quasi-adjudication; and in some such cases, courts have found retroactive application to have been an abuse of discretion by the Board. *See, e.g., NLRB* v. *Guy F. Atkinson Co., supra; NLRB* v. *E. & B. Brewing Company,* 276 F.2d 594 (6th Cir. 1960), *cert. denied,* 366 U.S. 908 (1961); *NLRB* v. *Majestic Weaving Co., Inc., supra; RWDSU,* 466 F.2d at 387-93. *See also* discussion of Judge Friendly in *H & F Binch Co.* v. *NLRB,* 456 F.2d 357, 364-365 (2d Cir. 1972).

In *RWDSU, supra,* where the D.C. Circuit refused to apply *Laidlaw* and *Fleetwood* retroactively, 466 F. 2d at 387-393, Judge McGowan examined the *Chenery II* standard in light of its above-cited progeny, and developed a list of five factors to be weighed in determining whether retroactivity was appropriate under *Chenery II:*

> "(1) [W]hether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of burden which a retroactive rule imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard." *RWDSU,* 466 F.2d at 390.

In the case at bar, the court below—contrary to petitioners' assertion (Pet. in NLRB case 31)—expressly "[took] these considerations into account" (55a) in reaching its conclusion that "retroactive application of *Laidlaw* and *Fleetwood* in this case would be unwarranted." 55a.[8]

The court determined expressly that *Fleetwood* (decided in 1967) and *Laidlaw* (decided in 1968) represented changes in settled law as it existed in 1960 and that those cases imposed duties and established rights that were not extant in 1960. 52a-57a.

Fleetwood broadly held that a striker retains employee status until he secures "regular and substan-

[8] The cases in which *Laidlaw* was applied retroactively are fully distinguished by the Court of Appeals at 57a, n.49 and in *RWDSU,* 466 F.2d at 391-392, n. 27-29.

tially equivalent employment" elsewhere. 389 U.S. at 381. Importantly, *Fleetwood* did not distinguish between strikers who were permanently replaced and those whose former jobs had been temporarily discontinued due to strike-related business losses.

Fleetwood reversed a Ninth Circuit decision which had held that the right to reinstatement of both permanently and temporarily displaced strikers was determined at the time of their application to return to work. If no appropriate job vacancy existed on that date the strikers lost all right to reinstatement. In so holding, the Court of Appeals had placed primary reliance on the Board's holdings in *Atlas Storage Division,* 112 NLRB 1175 (1955), *enforced sub nom., Chauffeurs, Teamsters and Helpers "General" Local No. 200* v. *NLRB,* 233 F.2d 233 (7th Cir. 1956), and *Brown & Root,* 132 NLRB 486 (1961), *aff'd,* 311 F.2d 447 (8th Cir. 1963).[9] Reversing the Ninth Circuit, this Court in effect rejected those earlier Board decisions. Thereafter in *Laidlaw* the Board expressly overruled *Atlas Storage, supra, Brown & Root, supra,* and *Bartlett-Collins Co.,* 110 NLRB 395, *aff'd sub nom., American Flint Glass Workers Union* v. *NLRB,* 230 F.2d 212 (D.C. Cir. 1956), holding those decisions to be in conflict with *Fleetwood.* As the court below noted in rejecting an argument by petitioners that *Fleetwood* had not effected a change in the existing law, had *Fleetwood* "not changed the law as it applied to reinstatement of economic strikers but instead simply reaffirmed long-established principles, we doubt that the case would have so immediately

[9] These cases held, *inter alia,* that the employee status of an economic striker was determined by whether vacancies existed on the date of application for reinstatement.

prompted the Board to change course and overrule three of its prior decisions . . . ." 54a.

Thus, both *Fleetwood* and *Laidlaw* established rights and duties that did not exist in 1960. The focus of these cases was not on *why* the job was unavailable. Rather, these two interrelated decisions simply eliminated the relevance of *when* the jobs were unavailable by holding that the employee status of an economic striker was not lost on the date of application for reinstatement if no job vacancy then existed. Thus, as reaffirmed by the Board in *Laidlaw, Fleetwood* changed the law respecting the right of reinstatement of *all* economic strikers, irrespective of whether their jobs were temporarily unavailable, permanently eliminated, or filled by permanent replacements. In fact, many of the strikers in the 1960 strike at issue had been permanently replaced. But even putting that fact aside, the Union places exaggerated importance on the distinction between permanent and temporary job unavailability.

With respect to the law which was changed by *Fleetwood* and *Laidlaw,* the court below properly focused on *Atlas Storage* as the pre-1960 case which most closely resembles the instant case on its facts, and which embodies the applicable law as of 1960. In *Atlas Storage,* the job of an economic striker was temporarily discontinued due to strike-related loss of business, i.e., the complement was "depressed". His application for reinstatement was denied because no vacancy existed due to this complement depression. The Board held that the employer was free to advertise for and hire a new employee when a vacancy later occurred, "[a]s [the striker's] employment was prop-

erly terminated when he applied for reinstatement." 112 NLRB 1175, 1180 n. 15.

Petitioners attempt to limit the reach of *Atlas Storage* by distinguishing between temporary and permanent vacancies, despite the fact that no such distinction had been articulated by the Board. The court below found the proposed distinction unacceptable, noting that in any case of job unavailability,

> "a striker could reasonably be expected to have an opportunity to regain a position with his employer. In any fairly sizable operation, employee turnover would assure that a job would eventually become available to economic strikers not immediately reinstated at the termination of a strike. This is true not only when a strike has caused a temporary cutback in business but also when a striker has been permanently replaced, or his job absorbed by other workers." 53a-54a.

In short, in *Atlas Storage,* the striker's loss of employee status was determined without regard to whether the complement reduction was permanent or temporary. This result was compelled by the fact that an employee's status was determined as of the date of application for reinstatement—a date when the duration of any existing complement reduction was unknown.

Thus, the law was settled in 1960. It was changed seven and eight years later by *Fleetwood* and *Laidlaw.* It is these facts which primarily distinguish *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975), from the case at bar, and demonstrate that petitioner's reliance on that Title VII case is misplaced.

Albemarle held that, under Title VII, good faith reliance on that which respondent *thought* was the state

of the law at the time it acted was no defense. Contrary to petitioners' argument, however, *Albemarle* is perfectly consistent with the Court of Appeals' decision herein. It fits squarely within the rationale of *Chenery II* and its progeny. This is because under Title VII, a new statute in whose early years virtually all the law was unsettled, good faith reliance was an "appeal to the 'unsettled state of the law'," *United States* v. *United States Steel Corp.*, 520 F.2d 1043, 1058-1059 (5th Cir. 1975). Hence, *Albemarle,* and *United States Steel Corp.* as well, in which respondents appealed to the prior deeply unsettled state of the law, do not conflict with the instant case, where the court below found imposition of retroactivity to be improper because, *inter alia,* the later cases overturned settled law.

Petitioners assert that the court below ignored the question of reliance on the prior state of the law, and failed to balance the statutory interest in retroactive application against the burden of retroactivity on the Company. These assertions simply ignore the court's express statement that it "[took] these considerations into account" (55a) in reaching its judgment. The court's consideration of the reliance and balancing factors is also clearly reflected in these statements:

> "Because *Laidlaw* and *Fleetwood* imposed duties on employers which had not theretofore existed, it would be unjust to use those cases to impose liability fifteen years after the events at issue transpired. [footnote omitted.]
>
> This is not a case in which the employer sought in bad faith to discriminate against strikers. Both the Board [footnote omitted] and the district court in the 301 case found otherwise. Throughout the strike settlement process, the Company

> had the advice of experienced labor counsel. The Strike Settlement Agreements providing for the preferential recall of strikers to jobs in their seniority areas which they were qualified to perform exceeded requirements of existing law. Under these circumstances we are not at this stage disposed to permit imposition of a substantial liability upon the Company." 56a-57a.

The finding that experienced labor counsel advised the Company in reaching a settlement renders nugatory any claim that the Company did not rely on the existing state of the law. Any suggestion that a company advised by experienced counsel or, for that matter, a union also advised by experienced counsel, would not or did not rely on the state of the law when engaging in settlement negotiations is simply not plausible.

Petitioners also speculate that denial of certiorari in the instant case "will inspire widespread gambling with conduct of 'questionable legality' . . . whenever that conduct is less expensive or more profitable than conduct which assuredly does not violate the rights of others." (Pet. in NLRB case 15). Such conjecture is unfounded and based upon a patently erroneous assumption—i.e., that the court below found that the acts in question were of "questionable legality" in 1960. Petitioners base this assertion on the "reasonable grounds for concluding" (54a) language of the court below. This phrase, magnified, misconstrued, and taken out of context by petitioners, is not license for employers to gamble with questionable law. The phrase is simply one of many in the opinion expressing the court's judgment that precedent and logic properly led to the conclusion in 1960 that reinstatement rights of strikers at that time were determined as of the date of application for reinstatement. To construe the decision below

as placing a judicial imprimatur on gambling with "questionable" law is a clear misreading of the court's opinion.

Clearly the Court of Appeals properly exercised its authority and discretion in this case in determining that *Fleetwood* and *Laidlaw* should not be retroactively applied, and there is no basis for review of that decision by this Court.[10]

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[10] The retroactivity issue only arose as it did in the court below because the Court of Appeals disagreed with the NLRB's finding that the Strike Settlement Agreements negotiated by the parties, which terminated the preferred hiring lists after December 31, constituted a waiver of any statutory striker reinstatement rights after that date. 219a-229a. But it is most important to note that the *reason* the Court of Appeals rejected the waiver finding was principally because it found (46a-56a) that in 1960-61, before *Fleetwood* and *Laidlaw, there were no post-December 31 statutory reinstatement rights that could be waived.* Thus, the Court of Appeals stated (54a): *"For the reason that Fleetwood, like Laidlaw, in our opinion established rights not existing in 1960, there could have been no knowing waiver of Fleetwood rights in this case."* (Emphasis added.) It is clear, then, that the Court of Appeals' disagreement with the Board's strongly stated waiver ruling is simply the opposite side of the coin of the court's finding that the law in 1960 did not require reinstatement after December 31, 1960, and that *Fleetwood* and *Laidlaw* later changed the law. The Court of Appeals' disagreement with the waiver ruling is thus not any disagreement at all with the basic Board position that the Strike Settlement Agreements were highly important in the NLRB case. On the contrary, the Court of Appeals, whose whole opinion bespeaks approval of the Strike Settlement Agreements, clearly took the Agreements very much into account in reaching its judgment that *Fleetwood* and *Laidlaw*, which were not the law in 1960, should not be applied retroactively. Thus the Board and the court below were not on opposite tacks in the NLRB case, but were on parallel courses, both placing heavy reliance on the Strike Settlement Agreements in reaching the result that the termination of the preferred hiring lists on December 31 was proper under the Act as it was under the Agreements.

B. Petitioners' final argument in the NLRB case is that the appellate court's decision violated *S.E.C.* v. *Chenery Corp.*, 318 U.S. 80 (1943) [hereinafter, "Chenery I"]; 332 U.S. 194 (1947) [Chenery II], which limited the scope of judicial review of administrative agency action. This argument misconstrues both *Chenery* and the decisions below.

Petitioners' argument focuses on three specific limitations allegedly established by the *Chenery* cases and allegedly violated by the Second Circuit. *See* Petition in NLRB case at 3, 35-36. However, petitioners have over-simplified the first two limitations and produced no authority for the third. First, *Chenery I* does not require that, irrespective of the particular issues involved, an appellate court must judge the propriety of agency action "solely by the grounds invoked by the agency." The Court explicitly limited this restriction on the scope of review to issues involving "a determination or judgment which an administrative agency alone is authorized to make . . . ." 332 U.S. at 196. Second, while *Chenery I* stated that a reviewing court may not "guess at the theory underlying the agency's action," 332 U.S. at 196, the decision does not require courts to elevate form over substance. As the Court explained, "We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words." 318 U.S. at 95; *see Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 286 (1974), *citing Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581, 595 (1945). Third, *Chenery II* simply did not hold or even imply that a reviewing court may not, after consideration of the

facts of a particular case, deny retroactivity in that case. *See* 332 U.S. at 202-203, and discussion, *supra,* at pp. 16-17.

Petitioners challenge, as inconsistent with the requirements of the *Chenery* cases, the appellate court's holding that *Laidlaw* and *Fleetwood* should not be applied retroactively to the present case. This challenge is based on a misreading of both *Chenery* and the Board's decision in the instant case.

Petitioners acknowledge that the Board opinion discussed the state of the law at the time of the strike and the Strike Settlement Agreements, but insist that the Board was not concerned with the issue of retroactivity and that the discussions were only an "element" of the Board's "waiver rationale." (Pet. in NLRB case 36). Contrary to the petitioners' claims, however, the Board's analysis was not narrowly limited to the issue of waiver. Instead, the Board stated the issue as "whether to modify Respondent's obligation as defined in the recall agreement in view of *Laidlaw* . . . ." 225a. The Board also focused on several factors, including the prior state of the law, which are relevant primarily to the issue of retroactivity. See the Court of Appeals opinion at 55a and discussion, *supra,* at pp. 17-18, 22-23, listing factors relevant to the issue of retroactivity. The Board's opinion clearly indicates its reliance on those factors which strongly support the denial of retroactivity: the new rule represents a clear departure from well-established practice (226a-228a and n.31); respondent relied in good faith on the former rule (225a-226a, 228a); the equities do not favor the imposition of further liability on the respondent (225a-228a); and the statutory objective of "encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes" outweighs any interest in applying the new rule retroactively (228a). See also n.10, *supra.*

Moreover, even if the Board's decision had rested solely on a waiver theory, the court's determination of the retroactivity issue would not in any way violate *Chenery.* Contrary to petitioners' assertions, *Chenery II* does not prohibit a court from denying retroactive application of a newly adopted administrative rule. *See* discussion, *supra,* at pp. 16-18. Nor is retroactivity "a determination or judgment which an administrative agency alone is authorized to make." As the Court of Appeals recognized, it is a question of law, appropriate for judicial resolution. Opinion at 55a, n.48; *see RWDSU, supra,* 466 F.2d 380, 390, citing *NLRB* v. *Guy F. Atkinson Co., supra.* Furthermore, as discussed in detail at pp. 16-18, 22-23, *supra,* the Court of Appeals was fully aware of and properly applied the guidelines on retroactivity set forth in *Chenery II* and subsequent cases.

Petitioners' remaining contention based on *Chenery* is also baseless. The Trial Examiner, in a finding adopted by the Board and upheld by the Court of Appeals, rejected petitioners' allegation that those strikers not rehired by December 31, 1960, were subsequently discriminated against when they reapplied for employment. 210a, 405a, 57a-58a. These determinations were supported by substantial evidence in the record (22a-25a, 57a-58a, 128a-149a, 210a, 405a; pp. 6-7, n.2 *supra*), which included the § 301 record (217a), and were properly upheld by the reviewing court.

Universal Camera Corp. v. *NLRB,* 340 U.S. 474 (1951).[11]

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted,

JOSEPH C. WELLS
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[11] The Union asserts in both petitions (§ 301 Pet. 32-35, Pet. in NLRB case 33-35) that the courts below and the Board misallocated the burden of proof with respect to the issue of strike-caused production imbalances, and the reduced employee complements attendant thereto. The short answer to the claim is that, wherever, as an abstract legal matter, the burden on the issue may have lain in the two cases, both courts and the Board clearly found, and the record shows, that the Company in fact proved its contentions with respect to production imbalances and employee complements following the strike. As the Court of Appeals said (62a, n.56): ". . . . Furthermore the Board's findings reveal that this was not a case in which the placement of the ultimate burden of persuasion was decisive of the outcome." This is clearly borne out in the Board's decision by the discussion at pp. 217a-218a.

Similarly, in the § 301 proceeding, the extensive discussion by both courts of the "complement depression" issue (10a-14a, 17a-25a, 32a-33a, 119a-149a) shows clearly that they found that the Company fully proved its contentions with respect to the issue. As the District Court said (148a): "While the plaintiffs placed this question [deliberate, bad faith complement depression] in issue by a *prima facie* showing, the defendant assumed its burden of going forward and advanced proof [footnote omitted] which *satisfied the Court,* that it had acted in good faith and was motivated by legitimate and substantial business justification in the performance of its obligations under the Strike Settlement Agreements." (Emphasis added.)